

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JASON and LAURA JONGEWARD,
husband and wife; GORDON and
JEANNIE JONGEWARD, husband
and wife and as Trustees of the
Jongeward Family Trust; CHARLES
POTTER, a single man; JOANN
POTTER, a single woman; SCOTT
and MICHELLE SIMMONS, husband
and wife; RICK and CHRIS
HOSMER, husband and wife; KEITH
and MARIANNE GESCHKE, husband
and wife; RANDY and COLLEEN
GESCHKE, husband and wife; and
GEANA VAN DESSEL, a single
person,

Plaintiffs,

v.

BNSF RAILWAY COMPANY,
commonly known as THE
BURLINGTON NORTHERN SANTA
FE RAILWAY, a Delaware
corporation doing business in the State
of Washington,

Defendant.

NO: CV-09-0010-RMP

ORDER ON PARTIAL SUMMARY
JUDGMENT

1 Before the Court is Plaintiffs' motion for partial summary judgment (Ct.
2 Rec. 128). Plaintiffs are individuals and married couples who have an interest in
3 real property in the Marshall area of Spokane County, Washington. Plaintiffs'
4 motion (Ct. Rec. 128) raises a nearly identical issue to one of the issues raised in
5 Plaintiffs' previous summary judgment motion (Ct. Rec. 66)—whether Defendant
6 BNSF Railway company, also known as the Burlington Northern Santa Fe Railway
7 Company ("BNSF"), is liable as a matter of law for the damage to Plaintiffs'
8 properties from a fire that spread from BNSF's right-of way on August 11, 2007.
9 The Court denied Plaintiffs' previous motion for summary judgment (Ct. Rec.
10 122).

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12 However, the Court permitted supplemental briefing to be filed on this
13 motion because of the disclosure by BNSF of new relevant evidence. Therefore,
14 the Court considers the issue of Defendant's negligence in light of the additional
15 factual information and legal analysis submitted by the parties. The Court
16 reviewed the extensive filings issued by the parties in relation to this motion,¹ and
17 issued an oral ruling on December 16, 2010. This order memorializes and
18 supplements the Court's oral ruling.

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26 ¹ Ct. Recs. 128, 130, 131, 132, 133, 134, 135, 144, 145, 146, 148, 149, 162, 186,
27 187, 188, 189, 192, 193, 198, 199, 200, 201, and 210.
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I. Background

Because the Court has previously outlined the facts of this matter in related proceedings, the Court recites only those facts pertinent to this particular motion.

BNSF operates a railroad in Washington and elsewhere on railroad lines that it owns and maintains, including a line between Spokane, Washington, and Pasco, Washington. On August 11, 2007, a BNSF train consisting of three locomotives and seventy railcars left Spokane around 10:45 a.m. headed for Pasco. BNSF's locomotive 1805 was part of the consist and was under power.

Locomotive 1805 is a roots blown locomotive, equipped with retention traps as part of its exhaust system. It had been under yard service prior to being moved as a working unit from Spokane to Pasco on August 11, 2007. The weather on August 11 was hot and dry, and as the train passed through the Marshall area southwest of Spokane, fire broke out at several points along the BNSF right-of-way. The fire spread to damage two houses and more than 360 acres, destroying many trees.

Following the Marshall fire, an internal BNSF investigation determined that BNSF employee James Jensen did not properly clean carbon deposits from the retention traps on Locomotive 1805 before that locomotive was transported under power to Pasco on August 11 (Ct. Rec. 191-14 at 30; Ct. Rec. 191-15 at 34).

1 The Washington State Department of Natural Resources (“DNR”) responded
2 to the fire and investigated its cause. The DNR report following the investigation
3 ruled out other potential causes of the fire and found that the BNSF train caused
4 the fires (Ct. Rec. 134-1 at 15).

6 **II. Jurisdiction and Summary Judgment Standard**

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8 This Court exercises jurisdiction pursuant to 28 U.S.C. § 1332 and,
9 therefore, applies Washington state substantive law. *Erie R.R. v. Tompkins*, 304
10 U.S. 64 (1938).

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12 Summary judgment is appropriate "if the pleadings, depositions, answers to
13 interrogatories, and admissions on file, together with the affidavits, if any, show
14 that there is no genuine issue as to any material fact and that the moving party is
15 entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party
16 bears the initial burden of demonstrating the absence of a genuine issue of material
17 fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party
18 must demonstrate to the Court that there is an absence of evidence to support the
19 non-moving party's case. *See Celotex Corp.*, 477 U.S. at 325. The burden then
20 shifts to the non-moving party to "set out 'specific facts showing a genuine issue
21 for trial.'" *Celotex Corp.*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

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23 A genuine issue of material fact exists if sufficient evidence supports the
24 claimed factual dispute, requiring “a jury or judge to resolve the parties differing
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1 versions of the truth at trial.” *T.W. Elec. Service, Inc. V. Pacific Elec. Contractors*
2 *Ass’n*, 809 F.2d 626, 630 (9th Cir.1987). At summary judgment, the Court draws
3 all reasonable inferences in favor of the non-moving party. The Court will not
4 presume missing facts, and non-specific facts in affidavits are not sufficient to
5 support or undermine a claim. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89
6 (1990).
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9 **III. Analysis**

10 Plaintiffs seek a determination of BNSF’s liability under Plaintiffs’
11 negligence-based claims. In Plaintiffs’ First Amended Complaint (Ct. Rec. 53),
12 Plaintiffs raised claims of negligence and negligently igniting and allowing a fire
13 to spread under RCW 4.24.040 (creating a cause of action for negligently
14 permitting a fire to spread from one’s own property to adjacent property).
15 Plaintiffs acknowledge that the issue of damages remains a question for the jury,
16 but maintain that there are no genuine issues of material fact as to whether BNSF’s
17 violation of an applicable standard of care proximately caused the fire that
18 damaged Plaintiffs’ properties.
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20 Negligence requires (1) a duty to conform to a certain standard of conduct
21 owed to the complaining party, (2) a breach of that duty, and (3) a showing that the
22 breach was the proximate cause of the complaining party’s injury, and (4) legally
23 compensable damages. *See, e.g., Hertog v. City of Seattle*, 138 Wn.2d 265, 275
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1 (1999), *aff'd in part, rev'd in part on other grounds*, 155 Wn.2d 306 (2005). The
2 elements of negligence also apply to claims under RCW 4.24.040. *See General*
3 *Ins. Co. of America v. Northern Pac. Ry. Co.*, 280 U.S. 72, 77 (1929).
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5 Washington law follows the general rule that “every actor whose conduct
6 involves an unreasonable risk of harm to another ‘is under a duty to exercise
7 reasonable care to prevent the risk from taking effect.’” *Minahan v. W. Wash. Fair*
8 *Ass’n*, 117 Wn. App. 881, 897 (2003) (quoting Restatement (Second) of Torts
9 §321 (1965)).² The existence of a duty turns on the foreseeability of the risk
10 created by the actor’s behavior. *Rikstad v. Holmberg*, 76 Wn.2d 265, 269 (1969);
11 *Parilla v. King County*, 138 Wn. App. 427, 436 (2007). “A duty can arise either
12 from common law principles or from a statute or regulation.” *Doss v. ITT*
13 *Rayonier, Inc.*, 60 Wn. App. 125, 129, *review denied*, 116 Wn.2d 1034 (1991).
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20 ² *See also* 16 Wash. Prac., Tort Law And Practice § 1.13 (3d ed. 2010), which
21 states: “Most tort liability arises from conduct that imposes a risk of harm to other
22 people. For example, when a person drives a car, operates a train, or distributes
23 flammable gas, the defendant’s conduct has created a *risk* of harm to others. By
24 creating the risk of harm to others, the defendant is charged with a duty to use
25 reasonable care to see that injury to others does not occur.”
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1 The Railroad Locomotive Safety Standards, Part 229 of Title 49, Code of
2 Federal Regulations, prohibit carriers from using or permitting to be used on its
3 line “any locomotive unless the entire locomotive and its appurtenances . . . [a]re in
4 proper condition and safe to operate in the service to which they are put, without
5 unnecessary peril to life or limb” and “[h]ave been inspected and tested as required
6 by this Part.” 49 CFR 229.7.
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9 BNSF internal maintenance policy “MNT-0138” establishes requirements to
10 clean the exhaust manifold retention traps, exhaust stack, and extensions on non-
11 turbocharged engines such as the roots blown locomotive at issue in this case. *See*
12 (Ct. Rec. 191-16 at 36-37). As stated in a Maintenance Advisory on February 23,
13 2000, BNSF policy is that any locomotive that has been in yard service for over 15
14 days must be cleaned consistent with MNT-0138 before being placed under power
15 (Ct. Rec. 191-16). The Advisory cautioned: “Adhering to this policy is critical in
16 preventing fires started by locomotives with an excessive amount of carbon in the
17 exhaust system” (Ct. Rec. 191-16 at 39).
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22 BNSF admits that “on August 11, 2007, BNSF considered MNT-0138 to be
23 its standard of reasonable care regarding inspection and cleaning of retention traps
24 and stack extensions in roots blown locomotives” (Ct. Rec. 191-15 at 34). BNSF
25 further admits that its employee “failed to sufficiently clean carbon deposits from
26 one or more mechanical retention traps of Locomotive 1805” pursuant to MNT-
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1 0138 before the locomotive left Spokane on August 11, 2007 (Ct. Rec. 191-15 at
2 34).

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4 This Court finds that, in light of the federal regulation, BNSF's maintenance
5 policy, and BNSF's admission that it considered the maintenance policy requiring
6 cleaning of retention traps the applicable standard of care, there is no question of
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8 fact that there was a foreseeable risk of fire from putting Locomotive 1805 under
9 power on the line between Spokane and Pasco on August 11, 2007 without having
10 properly cleaned the retention traps.
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12 Nor is there a question of fact as to whether BNSF failed to exercise
13 reasonable care as required by law. BNSF's internal investigation determined that
14 its actions fell below the level of care BNSF itself determined was reasonable and
15 disciplined its employee for failing to meet that standard of care. Finally, viewing
16 the record in the light most favorable to BNSF, the non-moving party, there is
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18 nothing in the record to create a material question of fact as to whether the BNSF
19 train caused the Marshall fire. *See e.g.*, DNR Report (Ct. Rec. 134-1 at 15)
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21 (concluding that "[a]ll fire causes were ruled out . . . except for Railroad caused").
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23 The Court finds that Plaintiffs have provided sufficient evidence to support
24 that BNSF was negligent and that Plaintiffs are entitled to summary judgment on
25 the issue of liability in this case.
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1 Accordingly,

2 **IT IS HEREBY ORDERED:**

3 1. Plaintiff's Motion for Partial Summary Judgment (**Ct. Rec. 128**) is
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5 **GRANTED.**

6 The District Court Executive is hereby directed to enter this Order and
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8 furnish copies to counsel.

9 **DATED** this 22nd day of December, 2010.

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12 *s/ Rosanna Malouf Peterson*
13 ROSANNA MALOUF PETERSON
14 United States District Court Judge
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